

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 23504-1-III
Title of Case: Herbert Nelson, obo v. Appleway Chevrolet, Inc., et al
File Date: 10/13/2005

SOURCE OF APPEAL

Appeal from Superior Court of Spokane County
Docket No: 04-2-01725-9
Judgment or order under review
Date filed: 10/13/2004
Judge signing: Hon. Kathleen M O'Connor

JUDGES

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HERBERT NELSON, on his behalf) No. 23504-1-III
and on behalf of all others)
similarly situated,)
Respondent,) Division Three
) Panel Seven
) v.)
) APPLEWAY CHEVROLET, INC., a)
Washington corporation, d/b/a)
APPLEWAY)
SUBARU/VOLKSWAGEN/AUDI,) PUBLISHED OPINION
APPLEWAY ADVERTISING, APPLEWAY)
AUDI, APPLEWAY AUTOMOTIVE)
GROUP, APPLEWAY CHEVROLET)
LEASING, APPLEWAY GROUP,)
APPLEWAY MAZDA, APPLEWAY)
MITSUBISHI, APPLEWAY SUBARU,)
APPLEWAY TOWING, APPLEWAY)
TOYOTA, APPLEWAY VOLKSWAGEN,)
EAST TRENT AUTO SALES, LEXUS OF)
SPOKANE, OPPORTUNITY CENTER,)
and TSP DISTRIBUTORS; and)
AUTONATION, INC., a Delaware)
corporation,)
Petitioner.)

KURTZ, J. - Business and Occupation (B&O) taxes are not intended to be construed as taxes upon purchasers or customers, but, instead, 'shall be levied upon, and collectible from, the person engaging in the business activities . . . and shall constitute part of the operating overhead.' RCW 82.04.500. Herbert Nelson purchased a vehicle from Appleyway Volkswagen. After the purchase price was negotiated, the parties signed a sales agreement listing an additional amount designated as 'Business & Occupation Tax Overhead.'¹ Mr. Nelson filed an action seeking a declaratory judgment that Appleyway's collection of the B&O tax, and the sales tax on the B&O tax, was unlawful. Mr. Nelson also requested class certification under CR 23(b)(2) and other relief. The court certified the class and granted summary judgment, concluding that Appleyway's method of itemizing and collecting the B&O tax and B&O sales tax was unlawful.

In this appeal, Appleyway challenges Mr. Nelson's right to bring this claim under Washington's uniform declaratory judgments act (UDJA). Appleyway further contends RCW 82.04.500 authorizes the pass through of the B&O tax to customers. Appleyway finally contends the court erred by certifying the class because Mr. Nelson lacked standing and has no cognizable claim. We conclude Mr. Nelson had a right to bring this claim under the UDJA. We hold Appleyway's manner of assessing and collecting the B&O tax from customers violated RCW 82.04.500. We further hold Mr. Nelson has standing and his request for monetary relief did not bar certification under CR 23(b)(2). Accordingly, we affirm the judgment of the trial court.

FACTS

In September 2002, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleyway Volkswagen in Spokane, Washington. Appleyway Volkswagen is a car dealership within the Appleyway Chevrolet, Inc., group of dealerships. The parties agreed on the price of \$16,822 for the vehicle and entered into an Agreement to Purchase (the 'Agreement'). In addition to the sales price, the Agreement listed several fees and taxes, including Washington State sales tax of \$1,255.60 and a charge of \$79.23 for Washington State B&O tax. The amount of sales tax included sales tax charged on the B&O tax.

Washington B&O Tax. Washington imposes a B&O tax for the privilege of engaging in business. RCW 82.04.220. This tax is measured by the

application of rates against the value of products, gross proceeds of sales, or gross income of a business. RCW 82.04.220. At issue in this case is the operation of RCW 82.04.500, which provides:

It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

Disclosure of B&O Tax. Appleyway points out that the B&O tax was disclosed to Mr. Nelson at four places on the contracts. First, the Agreement stated that Mr. Nelson would be charged \$79.23 'Business & Occupation Tax Overhead.' Clerk's Papers (CP) at 50. Second, in small print on the back of the page listing the charges, paragraph 12--of 13 paragraphs--read as follows:

12. Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount. B&O taxes are a tax on businesses for the right to operate in the State of Washington, are an overhead expense of the dealership, and are assessed as a percentage of total sales. As such, the amount of B&O tax assessed on your transaction depends on the negotiated price of the vehicle, service, parts, or other items being purchased by you. Sales tax is assessed on both the negotiated selling price and the B&O tax amount. All advertised vehicles, services, parts, etc. are advertised at a specific price plus B&O tax, sales tax, luxury tax, license fees, or other governmentally mandated charges.

CP at 51.

Catherine Nelson initialed a line on the Acknowledgement of Terms and Conditions of Vehicle Transaction form indicating that: 'I understand that the dealership is passing through the B&O tax overhead and that I am paying sales tax on the sales price and B&O tax amounts.' CP at 53. Mr. and Mrs. Nelson signed the Retail Installment Contract and Security Agreement that also disclosed the B&O charge.²

Complaint. Mr. Nelson filed a complaint requesting a declaratory judgment that Appleyway's collection of B&O tax, and the sales tax on the B&O tax violates

RCW 82.04.500. Mr. Nelson also asked the court to enjoin Appleyway from assessing or collecting these taxes from customers in Washington. Finally, the complaint also seeks further relief under RCW 7.24.080, alleging that Mr. Nelson should receive restitution because Appleyway has been unjustly enriched. The complaint alleged Mr. Nelson's claims are suitable for class treatment under CR 23(a) and CR 23(b)(2).

Significantly, the complaint does not allege claims based on theories of tort or contract, or based on a violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW.

Decision on Summary Judgment Motions. Both parties filed motions for summary judgment as to the issue of whether Appleyway's conduct was lawful. The superior court concluded that Appleyway's practice of itemizing and collecting the B&O tax from customers, and Appleyway's practice of collecting sales tax on the B&O tax, violated the applicable statutes.

Finding Appleyway's conduct had the potential to further injure Mr. Nelson, the court enjoined Appleyway from collecting, 'passing through,' or 'itemizing,' the B&O tax and the B&O sales tax. CP at 388.

Class Certification. Along with his motion for summary judgment, Mr. Nelson moved for class certification. The court granted the motion, certifying the class as:

All individuals and entities from whom Defendants itemized and collected B&O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington.{3}

CP at 380.

Reconsideration. The court denied Appleyway's motion for reconsideration but stayed its grant of declaratory and injunctive relief for 30 days to allow Appleyway to seek relief in the appellate court.

Discretionary Review. Appleyway filed a notice for discretionary review and a motion for a stay. This court granted both motions.

ANALYSIS

Standard of Review. The facts are undisputed and our review of the trial court's decision on summary judgment is de novo. See *Castro v. Stanwood Sch. Dist.* No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Questions of statutory construction are also reviewed de novo. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). A trial court's class certification decision is reviewed for an abuse of discretion. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) (quoting *Eriks v. Denver*, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992)).

Declaratory Judgment. Under Washington's UDJA, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). Specifically, RCW 7.24.020 reads, in part, as follows:

A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations. *DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

Enforceable Right/Private Cause of Action. One of the most contentious issues between the parties is whether Mr. Nelson is required to establish a private cause of action in order to obtain relief under the UDJA. This issue was raised at the summary judgment proceeding and the court concluded that Mr. Nelson need not show a private cause of action because he was not seeking tort damages. Appleyway maintains the trial court erred because Mr. Nelson must establish an independent private cause of action in order to pursue this matter as a declaratory judgment.

The confusion on this question is understandable because the term 'private cause of action' is frequently used in the context of tort litigation. While most tort theories arise from the common law, the legislature also has the power to define and change tort law. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). As a result, a duty may be imposed based on a statute or common law principles of negligence. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

In contrast, an action seeking declaratory relief may involve the construction of a statute, and injunctive relief may be more appropriate than damages. See *Wash. Fed'n of State Employees v. State Pers. Bd.*, 23 Wn. App. 142, 148, 594 P.2d 1375 (1979). For this reason, some declaratory judgment cases discuss whether there is a judicially enforceable duty and may or may not use the term 'private cause of action.' See, e.g. *Wash. Fed'n*, 23 Wn. App. at 148 ('legal right capable of judicial protection'); *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 536, 762 P.2d 356 (1988) ('private cause of action'; 'private right of action'; 'judicially enforceable duty').

In any event, this court has no jurisdiction under the UDJA unless Mr. Nelson can show that he is asserting a statutory legal right capable of judicial protection. *Wash. Fed'n*, 23 Wn. App. at 148. A cause of action will be implied if: (1) the plaintiff is in the class for whose benefit the statute was enacted; (2) the legislative intent expressly or implicitly supports creating or denying a remedy; and (3) implying a remedy is consistent with the purpose of the legislation. *McCandlish Elec., Inc. v. Will Constr. Co.*, 107 Wn. App. 85, 96-97, 25 P.3d 1057 (2001). Where a statute provides a new right, but no remedy, a remedy will be provided. *Id.* at 97.

RCW 82.04.500 states that the B&O tax was created to tax businesses, not purchasers or customers--but that businesses may include this tax in their business overhead. The UDJA is available to

resolve the tension inherent in RCW 82.04.500. Consequently, purchasers or customers, like Mr. Nelson, may proceed under the UDJA to determine whether Appleway's method of itemizing and collecting the B&O tax was unlawful under RCW 82.04.500.

Relying on *Blockbuster, Inc. v. White*, 819 So. 2d 43 (Ala. 2001), Appleway contends that customers have no judicially enforceable right under RCW 82.04.500.

In *Blockbuster*, a customer sought damages based on allegations that the video store fraudulently passed on a rental tax to customers. *Id.* at 44. The language of the statute provided that the rental tax would be imposed on each person engaging in the business of leasing or renting tangible personal property. *Id.* Significantly, the provision did not contain language similar to that found in RCW 82.04.500 stating that the tax was not intended as a tax on customers. The court concluded that the customer had no private cause of action under the applicable statute. *Blockbuster*, 819 So. 2d at 44.

Appleway cites several Washington cases to support its position that an action under the UDJA requires an independent, private cause of action. But these cases are also distinguishable. In *Washington Federation* the court concluded that a plaintiff seeking relief under the UDJA must assert 'a legal right capable of judicial protection which exists in a statute, constitution or common law.' *Wash. Fed'n*, 23 Wn. App. at 148. As a result, the court refused to allow review of a nonjudicial administrative decision under the UDJA because the agency was not engaging in statutory interpretation when making the decision. *Id.* at 146-48. In *Camer*, the court noted that declaratory relief was available to parties requesting construction of a statute, but the court concluded that the underlying administrative decisions did not involve the interpretation of a statute. *Camer*, 52 Wn. App. at 537.

Appleway also contends that this court has no jurisdiction because remedies are available under other statutes. Along similar lines, Appleway maintains that there is no need to imply a private cause of action under RCW 82.04.500 because the legislature made the decision to provide other statutory remedies for customers.

Appleway's underlying assertion is true. Courts are unwilling to find an implied private cause of action where the legislature has established a specific administrative or judicial appellate procedure. See, e.g. *Williams v. Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 281 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1491 (3rd Cir. 1994). This restriction prevents the UDJA4 from circumventing legislatively created enforcement provisions. *Id.*

But the Washington statutes Appleway suggests here are not helpful, or even applicable, remedies for Mr. Nelson. For example, Appleway contends that Washington customers have remedies for unfair and deceptive conduct under the CPA, RCW 19.86.090. Appleway also contends there is an extensive statutory scheme relating to tax administration and recovery granting taxpayers private remedies against the Department of Revenue relating to claims of overpaid taxes. But the CPA provides relief for certain types of unfair trade practices. Likewise, the tax provisions cited by Appleway, RCW 82.32.060, .150, .160, and .170, are available to taxpayers, not customers and purchasers, such as Mr. Nelson. In summary, a person whose rights, status, or other legal relations are affected by a statute may have a question of construction determined by the court. *Branson*, 152 Wn.2d at 877. Here, Mr. Nelson has demonstrated a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under the UDJA.

Justiciability and Standing. To proceed under the UDJA, a person must present a justiciable controversy and establish standing. A justiciable controversy is:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial,

rather than potential, theoretical, abstract or academic, and
(4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

The traditional doctrine of standing limits the justiciability determination and prohibits a litigant from raising another person's legal right. Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (Grant County II). A two-part test has been developed for determining if a party has standing to bring an action. Id. When applying this test, the court first inquires whether the interest asserted is arguably within the zone of interests protected by the statute or constitutional right at issue. Id. (quoting Save A Valuable Env't v. City of Bothell, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the court asks whether the party seeking standing has suffered an injury in fact, economic or otherwise. Id.

Appleway contends Mr. Nelson lacks standing to pursue a declaratory judgment action because the interest he asserts is beyond the scope of the statute. But RCW 82.04.500 states that the B&O tax 'shall be levied upon, and collectible from, the person engaging in the business activities' and that the B&O tax is not intended to be 'construed as taxes upon the purchasers or customers.' As a purchaser, Mr. Nelson is certainly within the zone of interest contemplated by the statute.

Appleway also maintains that Mr. Nelson's interest must be beyond the scope of the statute because he cannot establish a private cause of action under RCW 82.04.500. This argument repeats the assertions made in connection with the issue of jurisdiction. For example, Appleway relies on Van Eck v. Gavin, 690 A.2d 460 (Conn. Super. Ct. 1996). In Van Eck, the purchaser of petroleum products was not allowed to bring an action to challenge the assessment of a sales tax on the gross earnings of petroleum products because the purchaser did not qualify as a 'taxpayer' authorized to appeal under the applicable statute. Id. at 462.

Appleway also relies on Branson regarding the issues of standing and justiciability. In Branson, declaratory relief was denied because Mr. Branson and the class he represented lacked standing and because they failed to show a controversy arising between parties having genuine and opposing interests on the issue. Branson, 152 Wn.2d at 876-77.

Mr. Branson challenged the 'reasonable and uniform' provision of RCW 14.08.120(6), which is part of the statutory scheme that allows a municipality to raise money for its airports. The provision in question reads, in part, as follows:

PROVIDED, That in all cases the public is not deprived of its rightful, equal, and uniform use of the property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality.

RCW 14.08.120(6) (emphasis added).

Mr. Branson rented cars from Sea Tac airport and, on each occasion, his bill included a separate line item to cover the concession fee the rental car companies paid to Sea Tac. These rental car companies paid a fixed rent for counter space, plus a concession fee of 10 percent of their gross income. Branson, 152 Wn.2d at 867. Mr. Branson claimed the airport concession fees charged to rental car companies based on gross receipts denied the public uniform use of the property, were not uniform for the same class of people, and were not established with regard for the amount of property used and the expense of airport operation. Id. at 866.

The court determined that Mr. Branson lacked standing because he was not within the zone of interests intended to be protected by the 'reasonable and uniform' provision. Id. at 876. The court acknowledged that the statute indicated that it was designed to protect the public by ensuring 'equal and uniform public use,' but determined that the 'reasonable and uniform' provision pertaining specifically to charges indicated an intent to protect only those entities charged with fees by the Port. Id. In other words, the protection offered by the language limiting

charges did not extend to Mr. Branson because he was not charged the fee, but, instead, paid a recoupment fee to the rental car company. Id. Hence, the court determined that Mr. Branson did not fall within the zone of interests protected by the 'reasonable and uniform' language. Id.

Branson also examined the justiciability requirements of the UDJA. The court concluded that the controversy arising out of the challenged statutory language was not between parties having genuine and opposing interests on the issue. Because the fees were not charged directly by the Port to Mr. Branson, the two parties were not sufficiently opposed to satisfy the justiciability requirement of the UDJA. Id. at 878.

In short, while Appleyway relies heavily on Branson, this case is distinguishable as the language of the statute under consideration was vastly different than RCW 82.04.500.

Appleyway next maintains Mr. Nelson cannot bring a claim under the UDJA because he cannot establish injury in fact.

To establish harm under the UDJA, the claimant must demonstrate a justiciable controversy based on allegations of personal harm that are substantial rather than speculative or abstract. Grant County II, 150 Wn.2d at 802. Appleyway maintains that Mr. Nelson was not harmed because he would have had to pay the operating overhead charge even if it had not been disclosed. We disagree. Mr. Nelson meets this test because he purchased a vehicle from Appleyway and was charged with a 'Business & Occupation Tax Overhead' charge after negotiating the purchase price. CP at 50. Also, CR 57 provides: 'The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.' And, RCW 7.24.080 allows further relief based on a declaratory judgment or decree whenever necessary or proper.

In short, we conclude Mr. Nelson could bring this claim under the UDJA.

RCW 82.04.500. The trial court concluded that Appleyway's 'itemizing and collecting B & O Tax and B & O Sales Tax from buyers violates the laws of the State of Washington,' and enjoined Appleyway from collecting, 'passing through' or 'itemizing' B&O tax and B&O sales tax. CP at 388. Appleyway contends the court erred because RCW 82.04.500 expressly permits the pass-through of the B&O tax, and, in any event, does not prohibit the itemization of the tax pass-through to customers. This court reviews questions of statutory construction de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). When a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). A statute is ambiguous if 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.' State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). This court must discern and carry out the intent of the legislature, but must also avoid a literal interpretation leading to an absurd result. State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). Plain Language. RCW 82.04.500 is unambiguous. First, RCW 82.04.220 provides that the B&O tax shall be collected . . . for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Second, RCW 82.04.500 specifically provides that the B&O tax is not to be construed as taxes upon the purchasers or customers.' Third, RCW 82.04.500 also provides that the B&O tax 'shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.' Appleyway points out that the statute unambiguously provides that the B&O tax may be passed on to the customer as part of operating overhead. While this is true, we must also read the statute to give meaning to the language stating that the B&O tax should not be construed as a tax on purchasers and customers.

Citing Canteen Service, Inc. v. State, 83 Wn.2d 761, 762, 522 P.2d 847

